80-2103

No.

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERM, 1981

ROBERT Q. WHITWELL,
Petitioner,

vs.

BOARD OF LAW EXAMINERS OF TENNESSEE,
JAY GUY BEATTY, JR., HENRY HALL WALKER, JR.,
ROBERT L. GREEN, Individually and in their official capacities,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the District Court erred in dismissing this cause of action by a non-resident attorney for admission to practice law who alleged arbitrary and discriminatory acts which fall afoul of the Fourteenth Amendment by State Board of Bar Examiners for lack of subject matter jurisdiction due to states controlling interest over its practices concerning admission and application of its own rules.

(2) Whether in the alternative, the lower Court erred in failing to withold and defer its ruling on Plaintiff's action for the purpose of injunctively enforcing adherence to his constitutional guaranteed rights of procedural due process, to provide a full and fair litigiation of petitioner's claim.

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ROBERT Q. WHITWELL,
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VS.

BOARD OF LAW EXAMINERS OF TENNESSEE,
JAY GUY BEATTY, JR., HENRY HALL WALKER, JR.,
ROBERT L. GREEN, Individually and in their official capacities,
Defendants/Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Robert Q. Whitwell, a duly licensed and practicing attorney in Southaven, Desoto County, Mississippi, respectfully submits and prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 18, 1981.

OPINION BELOW

The Opinion of the Court of Appeals (uncited) F. 2d (1981), appears in the appendix hereto. Exhibit "A".

The Opinion that was rendered by the District Court for the Western District of Tennessee, is attached as Exhibit "B".

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on March 18, 1981, and this Petition for Certiorari was filed within ninety (90) days of that date, pursuant to 28 U.S.C. Section 2101 (c). This Court's jurisdiction is invoked pursuant to 42 U.S.C. 1983 and for violation of the appellant's equal protection and due process under the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

(1) 42 U.S.C. 1983.

(2) Fourteenth Amendment to the U.S. Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the Citizens of the United States; nor shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) Article III, Section II, Clause 1, U. S. Constitution.

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to controversies between two or more States; -between a State and Citizens of another State; -between Citizens of dif-

ferent States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject."

(4) Applicable Tennessee Supreme Court Rules for Licensing and Admission.

"SECTION 8. Admission by Reciprocity and Comity.

8.01. Definitions. Reciprocity is admission without examination of an applicant upon a license from another state without reference to the time the applicant has actively engaged in the practice of law, upon conditions no less favorable than those imposed by the applicant's licensing state for admission of lawyers licensed in Tennessee. Comity is admission without examination of an applicant, upon a license from another state, upon conditions no less favorable than those imposed by the applicant's licensing state for admission of lawyers licensed in Tennessee, and after the applicant has actively engaged in the practice of law for no less than five (5) years. . . .

8.02. Admission. An applicant licensed in another state may be admitted by reciprocity if a similar courtesy is granted by his licensing state to lawyers licensed in Tennessee applying for admission in that state. If an applicant's licensing state does not admit lawyers licensed in Tennessee by reciprocity, an applicant may be admitted by comity if a similar courtesy is granted by his licensing state to lawyers licensed in Tennessee applying for admission in that state. In considering an application for admission by comity, if the licensing state of the applicant requires applicants by comity in that state to have actively engaged in the practice of law for a period of time different from that specified in Paragraph 8.01, the applicant may be admitted if he has actively engaged in the practice of law for the period of time required of applicants by comity in

his licensing state, but in no event will such applicant be admitted if he has actively engaged in the practice of law for less than five (5) years.

8.03. Conditions. No applicant will be admitted by reciprocity or comity unless educational requirements for admission to the Bar in the applicant's licensing state are substantially the same as in Tennessee, and unless the applicant qualifies under other pertinent provisions of Rule 37. If an applicant has been licensed by more than one state, the Board shall determine in its discretion the licensing state to which reference shall be made in determining whether to admit an applicant by reciprocity or comity.

8.04. Application Filing Requirements. An applicant applying for admission by reciprocity or comity shall supplement his application by filing with the Board: (a) a certified copy of the record of the Court in the state which issued his license showing his admission to the Bar of that state, which license must confer the right to practice in the highest courts of that state; (b) three letters from attorneys and/or judges certifying that he is in good standing at that Bar, (c) and such other information and documents as the Board may deem necessary to support the application.

Section 8.05 of the above referred to subject Rule provides as follows:

"8.05. Board Certification. The Board shall certify to this Court such persons entitled to admission under this Section."

SECTION 15. Grievances, Board Hearings, and Court Review.

15.01. The Court will entertain no application from any person whomsoever, who may be affected directly or indirectly by Rule 37, for any change or modification therein, or for its construction. All persons having any

grievance resulting or arising from the enforcement of Rule 37 and/or any Section thereof (other than a grievance because of failure to pass the bar examination) shall make application to the Board for a hearing by said Board by serving a written request for a hearing upon the Secretary of the Board within fifteen (15) days after notice of the action by said Board. The written request for the hearing made to the Board shall advise the Board of the matters desired to be covered at the hearing. The petitioner shall have the right to be represented by counsel and present evidence at the time and place fixed by the Board for the hearing. In any matter the Board may order a hearing on its own motion, either before or after action taken by it.

Correlatively, Sections 1 and 1.02 of Rule 37 provide as follows:

"Rule 37. Section 1. Grant of license. -1.01. A license to practice law in the Courts of this State shall be granted by this Court *Only* upon the certificate of the State Board of Law Examiners (hereinafter referred to as "the Board") in accordance with Sections 29-101 through 29-109.

Said Board shall consist of three (3) attorneys licensed to practice law in the State, and in good standing. They shall be appointed from time to time by this Court and shall serve staggered terms of three (3) years. The terms of the first Board appointed pursuant to this rule shall run one, two, and three years respectively. (As amended February 22, 1978), *Emphasis added.*

"1.02. No one shall practice law in this State except upon a license issued thereunder and in accordance with this Rule."

SECTION 16. Citizenship, Residence and Domicile Requirements. Every applicant must be a citizen of the United States at the time he files his application, and no

person shall be eligible to receive his license until after he shall have established both his domicile and his physical residence within the State of Tennessee for a period of at least two (2) months. A person may, in the discretion of the Board, be considered as having qualified under these domicile and residence requirements if such domicile and residence are established in an area closely contiguous to the boundaries of the State of Tennessee and in an area which is customarily regarded as a residential adjunct or suburb to the State of Tennessee.

SECTION 17. Discretion of board to refuse license. -The Board may, in its discretion, refuse to issue a license if it has reasonable grounds to believe that the applicant has conducted himself in a manner as to raise questions concerning his intention or ability to support the Constitution of the State of Tennessee and of the United States and to truly and honestly demean himself in the practice of the legal profession to the best of his skill and abilities.

(5) Amended Tennessee Supreme Court Rules Changed after Petitioner's Application for licensing.

"Rule 36. Admission to the bar of this Court will be allowed upon motion, the applicant appearing in open court represented through a reputable member of the bar, that he or she is a citizen of this state, a person of good moral character, has been duly licensed to practice law under the statutes of this State, and intends to reside here permanently, practicing the profession of law. Citizens of this and other states who do not intend to practice their profession regularly in the courts of this State will not be admitted; provided non-resident attorneys desire to argue a case in which they have been employed, will, by comity, be allowed to do so, when presented by a member of the bar of this Court."

Signed, Chief Justice, and other Justices. Recorded in Minute Book 53, Page 101, Minutes of the Supreme Court, Nashville, Tennessee, January 25, 1978.

"Rule 37: It is hereby ordered that Rule 37, Section 8.02 of the Rules of this Court be, and the same hereby is amended by adding thereto the following sentence:

'An applicant may also be admitted after five (5) years of practice of law upon a license from another state, whether or not that state extends a similar courtesy to lawyers licensed in Tennessee applying for admission there, if the Board determines that such an applicant meets the educational requirements of Section 5, that he has taken a bar examination equivalent to that required by the Board, that his grade on such examination was equivalent to that required for admission to practice in Tennessee, and that he is otherwise qualified.'

Entered this the 17th day of August, 1977. Signed by the Chief Justice and Justices of the Supreme Court and the same recorded in Minute Book 52, Minutes of the Supreme Court, Nashville, Tennessee at Page 488."

STATEMENT OF THE CASE

This is a cause of action pursuant to 42 U.S.C., 1983, to secure the Right of the Petitioner to his liberty and property, and for damages and equitable relief derivative of violation of both substantive and procedural due process and equal protection under the Fourteenth Amendment to the U.S. Constitution to redress the deprivations of Rights, Privileges and Immunities secured thereunder.

The Petitioner, who since on and before January 20, 1972, has been a resident of and a licensed practicing attorney in Southaven, DeSoto County, Mississippi, applied to the Tennessee Board of Law Examiners on June 10, 1977, for Certification to the Supreme Court of the State of Tennessee of his

qualifications and eligibility to be issued a license to practice law in that State under the Reciprocity provisions of Tennessee Code Annotated 29-101 through 29-109, and Rules 36 and 37 of the Rules of the Supreme Court of Tennessee, which were in effect at the time of his Application on June 10, 1977. His Complaint alleged he had actively engaged in the practice of law for five (5) years and had established domicile and residence in an area customarily regarded as a residential adjunct or suburb of said state, all in accordance with the applicable statutes and rules for admission.

His Application for Certification was based upon Tennessee Law applicable to non-residents who shall have been, for a period of at least five (5) years, actively engaged in the practice of law in and who were residents of and domiciled in an area that is contiguous to and considered to be a residential adjunct of Tennessee. Further, the facts and/or contentions of the Complaint were uncontroverted, as is Petitioner's full compliance *with all other requirements of filing an application* under Section 8.04, Rule 37 of the Tennessee Supreme Court.

The Petitioner contends and alleged in his Complaint, a series of discriminatory acts by the said Tennessee Board of Bar Examiners, and its members individually, who, as a matter of policy, by scheme and devise, adopted and implemented a practice of denying such certification for licensure to attorneys from the State of Mississippi, and particularly this Petitioner, who wished to practice in the State of Tennessee, and who was likewise qualified and eligible for certification under applicable laws and Tennessee Supreme Court Rules in effect at that time.

Such 'discriminatory acts' alleged by the Complaint and founded upon 'factual pleading' may be characterized by, but not limited to, the following collective and individual acts of the 'Board' which, under the facts and circumstances obtaining, are constitutionally prohibited, and violative of that gambit of Civil Rights contemplated by 42 U.S.C., Section 1983:

1. Arbitrary, undue and unwarranted delay of actions by the Board;

2. Failure to enter an Order delineating scope or limitations of 'discovery';

3. Failure and refusal to grant a "Hearing" as a procedural, if not substantive 'right' affirmatively provided by law, and

4. Implementation of a calculated course of action, the desired effect of which was to effectively preclude this Petitioner, and others similarly situated, from eligibility and certification under the Rules of law appertaining thereto.

Contrary to the above provisions of the subject Rules set forth in the Petition for Application, and without alluding to the 'discretionary' grounds of Section 17 of the Rules, (after the Board requested and the Petitioner supplied, additional and corrected information and documentation, by letters of correspondence June 22, 1977, and June 24, 1977, respectively) the Board, on September 22, 1977, (the last day of time allowed under the subject Rule) *summarily denied* Petitioner's Application for Certification, and/or Licensing, based upon the Board's "Finding" or assertion that the Petitioner did not intend "to engage in the practice of law in Tennessee on a full-time basis" or perform "the majority of his practice in the State of Tennessee." This decision was totally contrary to the reasons set out in the Rules for Licensure.

Parenthetically, (unbeknowing to Petitioner, but as a matter of relevance to the subject-matter), in the interim, on August 17, 1977, the Supreme Court of Tennessee, by Minute Book entry, amended the subject Rule as follows:

> "It is hereby ordered that Rule 37, Section 8.02 of the Rules of this Court be, and the same hereby is amended by adding thereto the following sentence:

'An applicant may also be admitted after five (5) years of practice of law upon a license from another state, whether or not that state extends a similar courtesy to lawyers licensed in Tennessee applying for admission there, if the Board determines that such an applicant meets the educational requirements of Section 5, that he has taken a bar examination equivalent to that required by the Board, that his grade on such examination was equivalent to that required for admission to practice in Tennessee, and that he is otherwise qualified.'

Entered this the 17th day of August, 1977. Signed by the Chief Justice and Justices of the Supreme Court and the same recorded in Minute Book 52, Minutes of the Supreme Court, Nashville, Tennessee at Page 488."

On October 3, 1977, specifically comporting to provisions of Sections 15.01, 15.04, inclusive, Petitioner filed a formal, written Petition for a "Hearing" before the Board of Law Examiners, alleging that he was qualified under the law and eligible under the pertinent Rules for certification and admission to the practice of law in Tennessee under the provisions of Reciprocity as aforesaid.

By letter of October 7, 1977, the Board acknowledged receipt of Petitioner's Petition, but by additional letter of correspondence dated October 28, 1977, refunded his application fee and advised that he would be informed of a hearing date "as soon as possible".

Thereafter, as is alleged at page four (4) of the original Complaint, by correspondence dated November 2, 1977, the Board, after advising Petitioner that the "Hearing" would "not be an adversary proceeding", and that matters of 'discovery' were to be "purely discretionary" with the Board, requested a designation of the 'ultimate facts Petitioner wished to submit' at the "Hearing", which, as was again stated, would be granted "as soon as possible".

By correspondence dated November 8, 1977, (as was requested) Petitioner perceptively designated the following proof-related issues for "discovery":

"1. That the Board systematically attempts to refuse license to out-of-state applicants.

2. That the Board is not acting in good faith.

3. That the Board's actions are arbitrary, capricious and discriminatory.

4. That the Board's actions are in violation of (my) civil rights."

Thereafter, without further response or reply from the Board, and without further action or disposition by it of Petitioner's Application for certification and admission to the Tennessee Bar, (or, Petition for "Hearing" upon denial thereof, as contemplated by Sections 15.01, 15.04 inclusive of Rule 37), the Supreme Court of Tennessee, on January 25, 1978, proceeded to amend Rule 36 which permanently excludes the Mississippi resident, Petitioner herein, the right to be licensed in Tennessee, in its entirety and substituted therefor the following:

> "Rule 36. Admission to the bar of this Court will be allowed upon motion, the applicant appearing in open court represented through a reputable member of the bar, that he or she is a citizen of this state, a person of good moral character, has been duly licensed to practice law under the statutes of this State, and intends to reside here permanently, practicing the profession of law. Citizens of this and other states who do not intend to practice their profession regularly in the courts of this State will not be admitted; provided nonresident attorneys desiring to argue a case in which they have been employed, will, by comity, be allowed to do so, when presented by a member of the bar of this Court.

> Signed, Chief Justice, and other Justices. Recorded in Minute Book 53, Page 101, Minutes of the Supreme Court, Nashville, Tennessee, January 25, 1978."

Notwithstanding what appears to be, obviously, an 'exclusionary' and amended Rule, "Retrospective" and "Ex Post Facto" in nature, such amendatory Order of the Court comports to and is consistent with the Board's previous action and "Findings" relative to the instant proceedings and the Board's denial of certification, etc.; the Rule effectively abrogates what would otherwise be Petitioner's eligibility for certification...

To date, and to the time of the filing of his Complaint, the Petitioner on September 22, 1978, (to avoid the lassitudes of the applicable one (1) year Statute of Limitations), the Board, and its individual members (presumably relying upon such positions), neglected, failed and refused to permit, grant or allow a "Hearing", or further proceedings, which under specific provision of Section 15.01 of rule 37 is *a necessary prerequisite* to Common Law certiorari and review by the Court itself of the Board's Final Action and application of the effective and pertinent Rules;

Hence, Petitioner contends a denial of procedural, if not substantive, due process, and violation of the equal protection clause under the Fourteenth Amendment to the U. S. Constitution.

Further, it is contended, because of the State Judiciary's virtual monopoly of authority relative to his 'vested interests', liberty, and property rights as a practicing attorney, (and the resulting abuse and violation of such rights), the Petitioner elected the Federal District Court as his proper forum for a '1983' cause of action based upon the above and foregoing facts and circumstances: that the District Court and Sixth Circuit Court's failure to take jurisdiction over the subject matter; that the District Court's application of the Doctrine of Abstention is error. In light of these facts, this Petition for Writ is sought.

Additionally, since the filing of the Petitioner's Application to the Board of Bar Examiners, the Board committed other acts of which Petitioner complained.

REASON FOR GRANTING THE WRIT

(1) The decision of the lower court decided an important question of federal law, which should not be given to the states where relief is sought from deprivations and denial of the Petitioner's rights secured by due process and equal protection clauses of the Fourteenth Amendment and bad faith on the part of the Board of Law Examiners of the State of Tennessee.

The lower Court concluded that the District Court properly interpreted the law and dismissed the Petitioner's Complaint; however, its decision stated that the Petitioner's cause of action alleged the denial of due process and equal protection, but based its action upon the way a state authority has applied its laws on regulations which is not appealable in the federal courts. Conversely, the Petitioner admitted in his brief before the Court that under the authority of *Cantor* v. *Brading*, 494 S. W. 2d 139 (Tenn. 1973), and other statutory laws and rules of the Court, only the Supreme Court of Tennessee has original and exclusive jurisdiction and/or authority to grant (or deny) admission to that bar. (See also Section 19.4 and 19.74 of Rule 42 of the Supreme Court of Tennessee.) Further, the Petitioner stated specifically he does not challenge in anywise, the authority of the judicial branch of state government to promulgate the pertinent rules, nor the constitutionality or propriety of such rules, nor the form or avenue of appeal to the challenge of their validity. To the contrary, he strongly relies upon same as both substantive and procedural law in these premises. This Court should note that Petitioner's Complaint contained this language, but relied on denial of certain constitutional guarantees and civil rights as a basis of contest of the Board's action. Petitioner contends and alleges a series of discriminatory acts by the said Tennessee Board of Law Examiners and its members individually, who as a matter of policy, by scheme and devise, adopted and implemented a practice of denying such certification for licensure to attorneys from the State of Mississippi, and particularly this Petitioner, who wished to practice in the State of Ten-

nessee, and who was likewise qualified and eligible for certification under applicable laws and Rules of Court in effect at that time.

Such 'discriminatory acts' alleged by the Complaint and founded upon 'factual pleading' may be characterized by, but not limited to, the following collective and individual acts of the 'Board' which, under the facts and circumstances obtaining, are constitutionally prohibited, and violative of that gambit of Civil Rights contemplated by 42 U.S.C., Section 1983:

(1) Arbitrary, undue and unwarranted delay of actions by the Board;

(2) Failure to enter an Order delineating scope or limitations of 'discovery';

(3) Failure and refusal to grant a "Hearing" as a procedural, if not substantive 'right' affirmatively provided by law, and

(4) Implementation of a calculated course of action, the desired effect of which was to effectively preclude this Plaintiff/Appellant, and others similarly situated, from eligibility and certification under the Rules of law appertaining thereto.

(5) Implementation of certain rule changes after his filing for certification which arbitrarily precluded him from licensure.

(6) Conjuring up a reason for denial which was not the law or Rule at the time of his filing.

The Appellant takes issue that he has failed to present a constitutional question or issue which entitles him to redress or is shown from the facts alleged in his Complaint and reiterated here.

Conversely, the Petitioner strongly urges that the uncontroverted facts and contentions of the Petitioner and his full compliance with all requirements of the filing application under Section 8.04 of Rule 37 of the Tennessee Supreme Court Rules and other related sections for admittance under reciprocity strictly adhered to and said Petitioner was qualified for certification to the Supreme Court for licensing in the State of Tennessee. That disallowance of his certification and/or licensing, was based upon the Board's finding or assertion that the Petitioner did not intend to engage in the practice of law in the State of Tennessee on a full time basis or to perform the majority of his practice in the State of Tennessee, which in fact was a finding which was absolutely arbitrary, capricious and discriminatory under the Tennessee Supreme Court's *own* rules. Further, the Board of Law Examiners failure to provide the Appellant with procedural due process if not substantive due process with making such findings without a hearing violated his rights to equal protection and due process under the Fourteenth Amendment to the U. S. Constitution. The denial of a hearing came after the Petitioner's written Petition under the Supreme Court Rules for admission, and the Board of Law Examiners stated through their secretary that a hearing would be granted to the Petitioner on the issues referred to. By three separate letters stating that a hearing would be granted, the Board, neglected, failed and refused to admit, grant or allow a hearing or further proceedings which under the specific provisions of Section 15.01 of Rule 37 of the Tennessee Supreme Court Rules. It should be noted that these rules are a necessary prerequisite to common law certiorari and review by the Supreme Court of Tennessee itself of the Board's final action and application of the effective and pertinent rules. (emphasis added) This contingent in itself denied him due process and denied him access to the State Courts which the lower Courts relied upon in their basis for dismissing Petitioner's complaint.

Petitioner would show that his basic legal position of law is as follows:

A. There is apparently little, if any, significant factual disparity between the relative positions of the parties to this cause of action.

B. The legal position of Respondents, justifying and supporting the lower Court's Order of Dismissal and the Sixth Circuit's ruling, now appears to be reflected by the 1976 Tenth Circuit Opinion of *Doe* v. *Pringle,* 550 F. 2d, 596, and other authorities cited therein.

Presumably, the Respondents position may be fairly summarized as follows:

1. By virtue of the "original and exclusive" jurisdiction of the Judicial Branch of State government of matters of 'admission', 'licensing', and 'disciplinary' proceedings, *all matters of controversy* arising therein are founded upon Article III, section 2, Clause 1 of the U.S. Constitution, are reviewable *only* by the United States Supreme Court, and

2. Based upon the 'trend' established by 'recent opinions' of the United States Supreme Court, and irrespective of the coordinate constitutional provisons relative to legislative powers delineated by Article I, Section 8 of the U.S. Constitution (which is the 'enabling clause' of Constitutional Amendments - relative to 'local' subjects) *the expressed intent of Congress* in the area of civil rights, and alleged Constitutional deprivations, may be *restricted,* or ignored, *by judicial Fiat* of the U. S. Supreme Court, (i.e., the very Court which asserts exclusive Appellate jurisdiction), notwithstanding relevant Congressional considerations.

Petitioner neither subscribes to these positions, or 'conclusions' or law as being the 'law of the land', nor does he feel this Honorable Court is prepared to go thus far is sustaining the

Board's position and condoning the actions of the Respondents as complained of, abrogating the applicability of the Federal Civil Rights Statutes to proceedings involving those, who, as lawyers, are foremost sworn to uphold such fundamental and constitutional precepts.

C. In construing 28 U.S.C., Sections 1332, 1391, the Court in a Fourth Circuit 1961 Opinion, *Markham* v. *City of Newport News,* 292 F. 2d, 711, held that "Jurisdiction and Venue in federal courts are matters of federal law, and cannot be constricted by state statutes purporting to assign *exclusive* jurisdiction to a state forum".

Petitioner respectfully insists that such a Rule is no less applicable to the instant proceedings and to the expressed Congressional considerations of the Civil Rights Acts.

Further, relying upon the Doctrine of Stare Decisis, Appellant has theretofore in these proceedings cited established authority setting forth subject-matter jurisdiction as well as 'party' jurisdiction in 'Section 1983 Civil Rights Cases'. Many such cases involved 'Boards', 'Committees' and 'Individual' functionaries of the Judiciary, and in some instances, the 'Courts' themselves.

(See: *Konigsberg* v. *State Bar of California,* 77 S. Ct., 722; *Schware* v. *Board of Bar Examiners of New Mexico,* 77 S. Ct., 752; *Spevack* v. *Klein,* 87 S. Ct., 625; *In Re Ruffalo,* 88 S. Ct., 1222; *Baird* v. *State Bar of Arizona,* 91 S. Ct., 702; *Law Students Civil Rights Council, Inc.* v. *Wadmond,* 291 F. Supp. 722, 299 F. Supp., 117, 401 U.S. 154, and 91 S. Ct., 720; *McCray* v. *State of Maryland,* 456 F. 2d, 1,6; *Bevens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 456 F. 2d, 1339, 91 S. Ct., 1999; *Erdman* v. *Stevens,* 301 N. E. 2d, 426, 458 F. 2d, 1205; *Delgado* v. *McTighe,* 422 F. Supp., 725; *Newsome* v. *Dominique,* 455 F. Supp., 1373; *Richardson* v. *McFadden,* 540 F. 2d, 744; *Davis* v. *Passman,* 544 F. 2d, 865, and *Ktsanes* v. *Underwood,* 552 F. 2d, 740.)

By analyzing and comparing the above noted cases, and those authorities referred to and relied on by Respondents, in the Lower Court, in *Doe* v. *Pringle, supra,* 600-603, two fundamental, underlying and controlling factors emerge when attempting to reconcile and blend with nomenclature such as 'abstention', 'equitable restraint', 'lack of subject matter jurisdiction', or recognition of the principal of 'comity' in our system of federalism:

(1) The allegations of the instant Complaint do not comport with "'numerous individual mistakes" as are referred to..."inevitable in the day to day administration of our affairs"...nor to "incorrect or ill-advised personnel decisions..." (550 F. 2d, 603);

The allegations in the instant proceedings, which are to be taken as true, specifically assert that as a matter of policy, by scheme and devise, and as a matter of adopted practice, the Respondents deliberately failed and refused to comply with pertinent and mandatory Rules of Court; denied Petitioner a 'hearing', and did thereby deprive Appellant of access to 'due process' adjudication relative to eligibility for admission to the Bar...

(2) The distinguishing characteristic of an "Article III Controversy" which would preclude District Court '1983' jurisdiction in this or any other matter, is, whether or not the subject state proceedings "provided an opportunity for full and fair litigation" of Petitioner's claimed eligibility; i.e., whether denial of same constituted such a "substantial federal question" in "such a forum that the judicial power (in the state proceedings) is capable of acting upon it"; e.g., was the state proceeding a "final action" by the Tennessee Supreme Court denying "admission" to the practice of law in that state.

Certainly *it was not* under *McCray* v. *State of Maryland,* 456 F. 2d 1,6; *Chaney* v. *State Board of California,* 386 F. 2d 962, *Feldman* v. *State Board of Law Examiners,* 438 F. 2d 699, and *Sutton* v. *Lionel,* 585 F. 2d. 400.

It is significant to note too, that invariably, in every case cited by the Respondents in their Sixth Circuit Argument, the Court has observed that 'constitutional questions', either expressly or by implication, had been duly considered by the Supreme Tribunal of the Judiciary, and disposed of.

Not so in the instant proceedings.

Section 15 of Rule 37 of the Supreme Court of Tennessee provides that "the Court will entertain no application from any person whomsoever, who may be affected directly or indirectly by Rule 37, for any change or modification therein, or for its construction..." That Section further providing that "all persons having any grievance resulting or arising from the enforcement of Rule 37 and/or any Sechereof... *shall* make application to the Board for a *hearing*..." (emphasis added). The Petitioner here did so, to no avail.

Section 14.03 provides that such a hearing, and the Board's decision thereon, is a necessary prerequisite to an aggrieved party's Petition to the State Supreme Court for review of the Board's actions upon a Petition for Common Law Writ of Certiorari based upon "a complete transcript of the proceedings of the hearing..."

As a matter of 'procedural due process' this provision of the Tennessee Rules is readily distinguishable from those obtained in *Mildner* v. *Gulotta,* 405 F. Supp. 182 (1975), U.S.D.C., E.N.Y.) 425 U. S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d, 751 (1976).

Further, in conclusion, it is ludicrous to assert, as the Respondents apparently have asserted, that under the Doctrine of Abstention, etc., Petitioner is required to exhaust his remedies under State law (via Mandamus or Certiorari, etc.) in

light of the holdings of the U. S. Supreme Court in *Monroe* v. *Pape,* 81 S. Ct., 473, 482 *that it is not necessary* to exhaust state remedies before a suit can be instituted under the Civil Rights Act.

More recently, the Federal Court in *Ruffler* v. *Phelps Memorial Hospital,* 453 F. Supp., 1062, held that to justify dismissal for want of jurisdiction, the alleged constitutional claim must be patently without merit, and that the Federal remedy under statute authorizing civil action for deprivation of civil rights *is supplementary* to State remedy, and the latter need not be first sought and refused before the federal one is invoked; *and* that the Defendant's actions 'under color of state law' is a jurisdictional prerequisite which has application and is equivalent to 'State action' requirements of the Fourteenth Amendment of the U. S. Constitution.

Finally, the "Trend" alluded to in *Doe* v. *Pringle, supra,* page 600, relative to U. S. Supreme Court restrictions of jurisdictional scope of '1983' actions, must totally fall when confronted with the most recent pronouncements of that Court in extending both subject-matter and party jurisdiciton in Civil Rights matters, as in *Monell* v. *New York City Dept. of Soc. Service,* 56 L. Ed. 2d, 611.

Based upon the recognized "previous misapprehensions" of the U. S. Supreme Court concerning the Civil Rights Act the June 6, 1978, Opinion of the Court in the *Monell* case found:

(1) That local (City and County) governmantal officials sued in their official capacities were "persons" under 42 U.S.C., Section 1983, and not immune from liability.

(2) That municipal corporation, school boards, etc., could be sued directly for monetary, declaratory, or injunctive relief based upon unconstitutional implementation of "official policy", and

(3) That city officials sued in their official capacity are liable for a constitutional deprivation in the enforcement of mere "custom", even though not formally approved through the body's decision-making channels.

The very 'discretionary' and discriminatory actions or inactions of the Respondents herein presents a significantly close nexus to State action, through the Board and its members, and the challenged action of the regulated entity so that the actions of the latter may be fairly treated as that of the State itself as is delineated by the *Monell* Opinion, *supra.*

CONCLUSION

Petitioner respectfully submits that this case differs from the *Leis* v. *Flynt* (1979) case 439 U.S. 438, 99 S. Ct. 698 because he has shown the District Court he had entitlement under State law which was denied. This is not a complaint of the way a state authority has applied its laws which is not applicable to the Federal District Court, but one of absolute denial of a hearing, scheme and devise, abuse of power and denial of property right.

The Court must see that Petitioner herein is being placed in a state of limbo. Under the Tennessee Supreme Court Rules cited, he *could not* have proceeded to the Tennessee Supreme Court for relief by a Common Law Writ of Certiorari because the Board did not allow him to have a hearing, to seek discovery, or to complete a final transcript of their proceedings as none were granted. Further, the Board is an arm of the Supreme Court who promulgates the rules and who did institute rule changes which effected the denial of Petitioner's rights after his filing of the Application for Admission to exclusion permanently. The actions of the Board as set forth here and stated in the Petitioner's Complaint, expressly gave the District Court adequate jurisdiciton of the subject matter.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

79-1437

Robert Q. Whitwell,
Plaintiff-Appellant,

v.

Board Of Law Examiners,
Jay Guy Beatty, Jr.,
Henry Hall Walker, Jr.,
Robert L. Green, individually
and in their official capacities,
Defendants-Appellees.

ORDER

(Filed Mar 13, 1981)

Before: ENGEL and MARTIN, Circuit Judges and BATTISTI, District Judge*

Appellant Robert Q. Whitwell, a Mississippi attorney, brought a civil rights action in the district court, charging that the defendants violated his rights under the Due Process Clause of the Fifth and Fourteenth Amendments when they failed to grant him a hearing on his application for admission to practice law in Tennessee. Plaintiff also alleged that the defendants denied him equal protection of the law under the fourteenth Amendment when they failed to certify his eligibility to the Tennessee Supreme Court. The district court granted defendants' motion to dismiss on the basis that plaintiff had failed to allege

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*Hon. Frank J. Battisti, Chief Judge, United States District Court for the Northern District of Ohio, sitting by designation.

a case or controversy over which the federal district court had jurisdiction. The district judge relied upon *Ktsanes* v. *Underwood,* 552 F.2d 740 (7th Cir. 1977), and other authorities holding that since a state supreme court has exclusive jurisdiction to decide issues concerning admission to the state bar, controversies alleging a failure of that court to grant an individual due process or equal protection are reviewable in the United States Supreme Court, not in the United States District Court.

Upon our review, we conclude that the district court properly interpreted the law and dismissed plaintiff's complaint. In *Leis* v. *Flynt,* 439 U.S. 438 (1979), the Supreme Court held that the licensing and regulation of lawyers has been left exclusively to the states and the District of Columbia within their respective jurisdictions. The decisions in *Ktsanes, supra,* and *Doe* v. *Pringle,* 550 F.2d 596 (10th Cir. 1976), *cert. denied,* 431 U.S. 916 (1977), establish that actions alleging an individual denial of due process or equal protection, based upon the way a state authority has applied its laws on regulations, is not appealable to the federal district courts.

This is the posture of the present appeal. Appellant has not alleged that a particular law or rule is unconstitutional, but rather attacks the manner in which state rules were applied to his particular bar application. For this his remedy, if any, must be through the Tennessee courts and then by direct appeal to the Supreme Court. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES DISTRICT COURT
For The
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action File No. 78-2493

Robert Q. Whitwell

v.

Board Of Law Examiners Of Tennessee, *et al*

JUDGMENT

(Filed July 12, 1979)

This action came on for consideration before the Court, Honorable Robert M. McRae, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that this cause is dismissed in compliance with Order Granting Defendants' Motion To Dismiss entered July 11, 1979.

APPROVED:

Robert M. McRae, Jr.
United States District Judge

Dated at Memphis, this 12th day of July, 1979.

/s/ J. Franklin Reid
Clerk of Court

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 78-2493

Robert Q. Whitwell,
Plaintiff,

v.

Board Of Law Examiners *et al*,
Defendant.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Filed July 11, 1979)

Plaintiff, Robert Q. Whitwell, is a resident, licensed, practicing attorney in the State of Mississippi. Defendants are the Board of Law Examiners of Tennessee; Jay Guy Beatty, Jr., individually and in his capacity as President of the Board; Henry Hall Walker, Jr., individually and in his capacity as Vice-President of the Board; and Robert L. Green, individually and in his capacity as Secretary-Treasurer of the Board. Plaintiff asserts that the defendants have unconstitutionally denied him a license to practice law in the State of Tennessee by refusing to issue a certificate to the Supreme Court of Tennessee.

Nature of Motion

Defendants have moved to dismiss the suit on the grounds that this Court lacks subject matter jurisdiction and that the complaint fails to state a claim upon which relief may be granted.

Statement of Facts

On June 10, 1974, plaintiff applied for a license to practice law in Tennessee pursuant to Tenn. Code Ann. 29-101-110, and Rules 36 and 37 of the Tennessee Supreme Court Rules. On June 22, 1977, the executive secretary of the Board returned the application so that additional questions could be answered by plaintiff and for an additional letter of good standing from a member of the Mississippi Bar. On June 24, 1977, plaintiff returned these materials to the Board. On September 22, 1977, plaintiff received notification that his application had been denied. The basis of the denial was that plaintiff did not intend to engage in the practice of law in Tennessee on a full-time basis or perform the majority of his practice in the State of Tennessee. On October 3, 1977, plaintiff requested a hearing before the Board. As yet, no date has been set for a hearing. By this suit, plaintiff seeks both damages and a certificate to the Supreme Court of Tennessee that he is entitled to a license under 42 U.S.C. of 1983.

Discussion

Section 1 of the Tennessee Supreme Court Rule 37 provides that "[a] license to practice law in the Courts of this State shall be granted only upon the certificate of the State Board of Law Examiners . . . . " Section 8.05 provides that "[t]he Board shall certify to this Court such persons entitled to admission . . . . " While it is true that non-resident attorneys may appear in the state courts of Tennessee by comity, Rule 37 §8.06 provides this courtesy to attorneys "who do not desire to practice regularly in this State . . . . " Section 16 of Rule 37 states that a resident of an area contiguous to Tennessee may qualify as a resident, in the Board's discretion, for purposes of acquiring a Tennessee law license.

Plaintiff desires to be admitted on his Mississippi license by reciprocity. To that extent, *Knowlton* v. *Board of Law Examiners,* 513 S.W.2d 788 (Tenn. 1974), states that residency

may be required for admission on comity or reciprocity. This was not a denial of equal protection, since Knowlton could take the bar examination and thus be admitted.

Admission to a bar of a state is a matter concerning the judicial branch of the state government. *Cantor* v. *Beading*, 494 S.W.2d 139 (Tenn. 1973). The Supreme Court of Tennessee is the proper forum for plaintiff. If plaintiff deems any issue appropriate for further service, his appeal is then to the United States Supreme Court. *State ex rel Carden* v. *Fones*, 539 S.W.2d 810, 811 (Tenn. 1976).

An Article III controversy is created by denial of a claim of present right to admission to the bar of a state. *Willner* v. *Committee on Character*, 373 U.S. 96, 102 (1963). Where there is no case or controversy presented by the complaint which would be recognizable in the Supreme Court of the United States, the federal district court does have jurisdiction to hear the complaint. *Ktsanes* v. *Underwood*, 552 F.2d 740 (7th Cir. 1977). There is no jurisdiction in the federal district court to review a final action of a state supreme court concerning the disposition of one application. *Delgado* v. *McTighe*, 442 F.Supp. 725 (E.D. Penn. 1977).

Since plaintiff claims a present right to admission to the bar of the State of Tennessee has been denied, an Article III controversy is created and the district court lacks jurisdiction over the subject matter. Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

ENTER: This 11th day of July 1979.

/s/ Robert M. McRae, Jr., Judge